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The Justice and the Jury

Jason Mazzone[†]

I. INTRODUCTION

Judges who work with juries—trial judges—tend to think very highly of them.¹ Studies show that trial judges almost unanimously believe that juries reach fair verdicts; most trial judges report that if they personally were involved in a criminal or civil case they would want it to be decided by a jury.² Judge William L. Dwyer, a judge for fifteen years on the United States District Court for the Western District of Washington in Seattle, considered jurors his “courtroom companions” who routinely produced “fair and honest verdicts.”³ Chief Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa states that it

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¹ The favorable views held by trial judges contrast with commentators’ frequent criticisms of juries. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (1966) (“[T]he jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”) (quoting Erwin Griswold, Dean’s Report 5-6 (1963) (on file with Harvard Law School Library Special Collections)); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190 (1990) (“Numerous examples support the contention that a jury selected at random sometimes serves as an incompetent decisionmaker.”); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1497 (1999) (“Well-publicized instances of crazy jury trials—interminable, uncivil, lawless, resulting in outlandish verdicts and other egregious miscarriages of justice, or all these things at once—have convinced some observers that the American system is grossly inefficient.”). But see VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 163 (1986) (“[T]he hard facts indicate that on the whole the jury behaves responsibly and rationally.”); William Glaberson, *A Study’s Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES, Aug. 6, 2001, at A9 (reporting from a study of nearly 9,000 trials that judges award punitive damages about as often and in the same proportion as do juries).

² See John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1684-85 (2001) (reporting results of a survey of federal and state trial judges in Texas).

³ WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY*, at xi, xiii (2002).

would be “catastrophic for the nation” if civil juries were to disappear.⁴ According to Nebraska trial judge Lyle Strom: “Out of hundreds of jury trials, I can count on fewer than the fingers of one hand the verdicts that I thought made no sense.”⁵ How many of us would say the same about the decisions of the U.S. Supreme Court or other appellate courts?

The justices of the Supreme Court do not sit with juries and therefore observe their work only by reading trial transcripts—transcripts in cases in which the losing party is arguing that the outcome of the case was flawed. Yet Supreme Court decisions heavily influence the work of juries: the tasks juries will be called upon to perform⁶ and how labor will be divided up between judges and juries;⁷ how jurors are selected;⁸ the evidence juries see and the arguments they hear;⁹ the

⁴ Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 308 (2005).

⁵ Quoted in DWYER, *supra* note 3, at 137.

⁶ For example, in the modern era at least, “in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.” *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

⁷ For example, in the criminal context, the Court has held that defendants have a right to have a jury decide every element of the crime. *See United States v. Gaudin*, 515 U.S. 506, 510 (1995) (“We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” (emphasis added)). A series of recent cases limit the ability of judges to make their own factual findings at sentencing. *See United States v. Booker*, 543 U.S. 220, 230-32, 34 (2005) (holding that Sixth Amendment was violated by imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of facts other than a prior conviction that were not found by the jury or admitted by the defendant); *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (invalidating state sentencing law that allowed judge to impose sentence beyond standard range upon finding aggravating factors, in this case that the defendant acted with deliberate cruelty); *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (holding unconstitutional state statute that allowed the trial judge sitting alone to decide whether there existed aggravating factors to warrant the imposition of the death penalty); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”). *See generally* Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 795 (2005) (concluding that “the [Supreme] Court has been more generous in its allocation of power to the criminal jury under the Sixth Amendment as compared to its allocation of power to the civil jury under the Seventh Amendment”).

⁸ *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that prosecutor’s use of peremptory challenges to remove potential jurors solely on the basis of their race violates equal protection).

⁹ *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595-97 (1993) (holding that Federal Rule of Evidence 702 requires trial judges to act as gatekeepers to ensure that scientific expert testimony presented to a jury is both reliable and relevant).

consequences of jury deadlock;¹⁰ and, of course, whether jury verdicts will be overturned or left in tact.¹¹ What the justices think of juries, then, is a matter of importance.

This Article examines Justice Harry A. Blackmun's view of juries. A close reading of Blackmun's opinions and of opinions by other justices that Blackmun joined demonstrates that Blackmun had a view of juries that, at least in modern times, is unusual. Blackmun saw juries as important but not for the typical reasons. He did not think juries were especially remarkable as fact-finding bodies: juries, in his view, were not needed to find facts accurately and, worse, they could easily get facts wrong. Blackmun also did not think of juries in terms of individual rights: he placed little emphasis on the criminal jury trial as a right of defendants and he did not consider juries to be in court principally to protect the defendant's interests.

Instead, Blackmun saw juries primarily as an element of democratic government. Here, too, Blackmun's view was unusual. Blackmun placed some stock—though not as much as some of his other colleagues on the Court—in juries' serving democracy by preventing government overreaching and protecting liberty.¹² But for Blackmun, the main democratic

¹⁰ See, e.g., *Allen v. United States*, 164 U.S. 492, 501-02 (1896) (holding that there was no error when a criminal jury returned for further instructions and the trial court judge instructed the jurors that "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself," and "[i]f . . . the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority"). The Court has stated that the propriety of administering an *Allen* charge to a deadlocked jury is "beyond dispute." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

¹¹ See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994) (holding that in the absence of sufficient alternative due process safeguards, state constitutional provision preventing judicial review of the amount of punitive damages imposed by a civil jury violated the Fourteenth Amendment unless the reviewing court could affirmatively say there was no evidence to support the verdict); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant [in a criminal case] if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence"); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) ("[T]he critical inquiry on [appellate] review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U.S. 606, 608 (1936) (stating that in reviewing a civil jury's verdict "[t]he appellate court cannot pass upon the weight of [the] evidence" (citations omitted)); *Hansen v. Boyd*, 161 U.S. 397, 402 (1896) (noting that an alleged assignment of error that "ask[ed the Court] to determine the weight of proof . . . usurp[ed] the province of the [civil] jury").

¹² See *infra* notes 41-45 and accompanying text.

benefit of the jury was as a participatory institution.¹³ Like voting, Blackmun viewed serving on a jury as a right and a responsibility of citizenship.¹⁴ Blackmun therefore saw it as his job, as a justice on the Supreme Court, to make sure that the jury operated properly as a participatory democratic institution.¹⁵ In particular, whatever other rules the Supreme Court might make about juries, it had to ensure at least that juries were open to all citizens.¹⁶

Parts II and III of the Article explore Blackmun's democratic view of juries. Part II traces Blackmun's disagreement, expressed in a series of cases, with conventional accounts of why juries are valuable. Part III examines Blackmun's own view of juries as robust sites of democratic participation.

Understanding how Blackmun viewed juries does more than shed light on the jurisprudence of a former member of the Supreme Court. Taken seriously, Blackmun's insights about juries have important, and troubling, implications for the present state of American democracy, the subject of Part IV. In addition to pointing to some needed reforms in jury practices, Blackmun's approach suggests that the recent phenomenon of the vanishing jury trial represents a disappearance of democracy itself.

II. THE VALUES OF JURIES

Why juries? Three reasons are commonly offered for why juries are valuable. First, juries are good at finding facts: twelve people who listen to evidence and then deliberate together over what they have heard are more likely to get things right than is a single fact-finder deciding an issue alone.¹⁷ Second, juries, particularly in criminal cases, serve as

¹³ See *infra* Part III.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *infra* notes 85-147 and accompanying text.

¹⁷ See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 827 (2001) ("Juries consist of groups, and group deliberation might reduce some illusions of judgment. . . . [For example, because groups usually remember more of the relevant facts than individuals, group decision making can mitigate some of the hindsight bias's influence, suggesting that juries might more successfully avoid the hindsight bias than judges." (footnote omitted)); Saul Levmore, *From Cynicism to Positive Theory in Public Choice*, 87 CORNELL L. REV. 375, 375 & n.1 (2002) (describing the Condorcet Jury Theorem as stating that "a large number of observers will do better than any non-expert individuals, so that it is comforting to be part of a group because

a check on the government: criminal juries watch out for the rights and interests of the individual defendant, and, as a result, safeguard liberty more generally by shielding other people from future government abuses.¹⁸ Third, juries legitimize outcomes: the general public is more likely to respect decisions reached by ordinary citizens. In civil cases, verdicts reflect the views of the community; a jury verdict in a criminal case is fair because it is the decision of the defendant's peers.¹⁹

Consider, then, what Justice Blackmun thought of these three rationales. Justice Blackmun clearly did not think the reason for having juries was that they accurately find facts. Three important cases illustrate Blackmun's view on this issue: *McKeiver v. Pennsylvania* (1971),²⁰ *Codispoti v. Pennsylvania* (1974),²¹ and *Ludwig v. Massachusetts* (1976).²²

In *McKeiver*, the Supreme Court held that there is no right under the Due Process Clause of the Fourteenth Amendment to a jury trial in a state court juvenile delinquency proceeding.²³ Writing for a plurality, Justice Blackmun avoided the question of whether a juvenile proceeding is a

the group can correct the misimpressions of the individuals"); Michael J. Saks, *Book Review: Blaming the Jury*, 75 GEO. L.J. 693, 706-07 (1986) (reviewing VALERIE P. HANS & NEIL WIDMAR, *JUDGING THE JURY* (1986)) (writing that studies "give[] us reason to wonder if juries will not be superior to judges in complex cases" including because the "jury represents the reliable middle ground between judges who will range from excellent to poor at complex factfinding" (footnotes omitted)).

¹⁸ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (stating that trial by jury "guard[s] against a spirit of oppression and tyranny on the part of rulers" and is "the great bulwark of civil and political liberties" (quoting 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 540-41 (4th Ed. 1873))); *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (stating that "the purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues"); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

¹⁹ See, e.g., Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Diversity*, 78 CHI.-KENT. L. REV. 1033, 1039 (2003) ("To the extent that the jury legitimizes the verdict to the public, it builds public confidence in the legal system as a whole."); Nancy Gertner, *Book Review: Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 924 (1995) (reviewing STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)) ("[The jury] make[s] critical, and presumably accurate, decisions about central social issues, at the same time that it legitimizes those decisions by providing for the most representative lay participation."); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 884 (2002) ("Juries powerfully help to legitimize judicial activity.").

²⁰ 403 U.S. 528 (1971).

²¹ 418 U.S. 506 (1974).

²² 427 U.S. 618 (1976).

²³ 403 U.S. at 551.

criminal proceeding for purposes of the Sixth Amendment right to a jury trial and he wrote instead that while juveniles are entitled to a fact-finding process that comports with due process, due process itself does not require fact-finding to be conducted by a jury.²⁴ “[O]ne cannot say,” Blackmun explained, “that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we . . . [are] content to pursue other ways for determining facts.”²⁵ Elsewhere, Blackmun noted that the jury performs “no particular magic.”²⁶ In other words, a process can be a fair process, and produce accurate results, even when a jury is not a part of the proceeding.²⁷

Moreover, Blackmun reasoned, in juvenile proceedings, not only will a jury be unnecessary to accurately find facts, something that can be done perfectly well by a judge, a jury in such cases will have a negative effect: the jury will turn the juvenile court into a full-blown adversarial proceeding, undermining the role of the juvenile court in protecting and nurturing young people.²⁸ The jury, then, is not needed to find facts and will likely only get in the way.

In *Codispoti*, the Court, in a majority opinion by Justice White, held that following the verdict, a criminal defendant facing contempt charges for conduct during the course of a trial is entitled to a jury under the Sixth Amendment if the aggregate sentence for the contempt charges exceeds six months.²⁹ Dissenting from the majority’s extension of the Sixth

²⁴ *Id.* at 543-45. The case involved two juveniles from Pennsylvania: Joseph McKeiver, aged sixteen, was charged in family court with robbery, larceny, and receiving stolen goods. *Id.* at 534-35. Rejecting his request for a jury trial, the judge found him to be a juvenile delinquent and ordered probation. *Id.* at 535 & 558 (Douglas, J., dissenting). Fifteen-year old Edward Terry, charged with assault and battery on a police officer and conspiracy, also sought a jury trial. *Id.* at 535 (majority opinion). Again denying the request, the judge determined Terry was a delinquent and ordered him committed to a home for youths. *Id.* A companion case decided from North Carolina heard along with *McKeiver* involved a group of Black children charged with disorderly conduct for protesting schooling conditions—also adjudged delinquents without the benefit of a jury trial. *Id.* at 536-38. The state judge in that case ordered the children in the custody of the state Department of Welfare but suspended the order on the condition that the children refrain from further infractions, report monthly to a welfare officer, and attend school without further disruption. *Id.* at 537-38.

²⁵ *Id.* at 543. Blackmun explained: “Juries are not required, and have not been, for example, in equity cases, in workmen’s compensation, in probate, or in deportation cases. Neither have they been generally used in military trials.” *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 547.

²⁹ 418 U.S. at 514-18.

Amendment jury right, Blackmun saw no reason why a judge, acting alone, cannot determine whether the defendant is guilty of contempt as a result of conduct during the course of the trial.³⁰ Blackmun wrote: “the contempt [takes] place in open court and the incident and all its details are fully preserved on the trial record.”³¹ A judge, then, can review the record and make appropriate findings of fact.³² Blackmun reasoned that any bias on the part of the trial judge could be dealt with by assigning the contempt case to a new judge.³³ Blackmun therefore stated that he was “at a loss . . . to see the role a jury is to perform.”³⁴ More generally, Blackmun urged, “[t]he determination of whether basically undisputed facts constitute a direct criminal contempt is a particularly inappropriate task for the jury,” and the job should instead be “the exclusive province of the court.”³⁵ Blackmun reasoned that since the jury would not be responsible for determining the sentence on the contempt charges, there was nothing it could ever do to “mitigat[e] an excessive punishment.”³⁶ Hence, the jury was not needed.³⁷

Even in a straight-up criminal trial, Blackmun did not consider a jury essential to accurate fact-finding. In our third case, *Ludwig v. Massachusetts*, decided in 1976, Blackmun stated in his majority opinion that “[t]here is no question . . . that a person who is accused of crime may receive a fair trial before a magistrate or a judge.”³⁸ Accordingly, in *Ludwig*, Blackmun held constitutional a two-tier criminal system in Massachusetts in which a defendant is tried in the first tier before a judge, but is entitled to appeal a conviction to the second tier and be tried there *de novo* by a jury.³⁹ Brushing

³⁰ *Id.* at 522 (Blackmun, J., dissenting).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 522-23.

³⁴ *Id.* at 522.

³⁵ *Codispoti*, 418 U.S. at 523.

³⁶ *Id.* at 523.

³⁷ By contrast, twenty years later, Blackmun held for a unanimous court that a union could not be held in contempt for violating a labor injunction and fined in the amount of \$52 million without the benefit of a jury trial. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 839 (1994). The fine, Blackmun reasoned (in part of his opinion joined by six other justices), was punitive rather than compensatory and while not all criminal contempt fines require a jury trial, here the magnitude of the amount made it a serious criminal sanction and triggered the Sixth Amendment. *Id.* at 837-38 & n.5.

³⁸ 427 U.S. at 627 n.3.

³⁹ *Id.* at 631-32.

aside the petitioner's arguments—that the Massachusetts system burdens the defendant with delay, expense and inconvenience; subjects the defendant to the risk of a harsher sentence if tried a second time and convicted at the second tier; and is a form of double jeopardy—Blackmun reasoned that the availability of a jury, even if only after the first trial ran its course, satisfied the Constitution's requirements.⁴⁰

Justice Blackmun, thus, did not place much stock in the commonly held view that juries are valuable because they are good at finding facts. How about the second reason frequently offered in support of juries—their value in keeping government in check and protecting liberty? Blackmun's colleague, Byron White, was enthusiastic about juries as a curb on government power, and Blackmun joined opinions by White explaining how juries exist as a safeguard against arbitrary government action. For example, in 1972, in *Apodaca v. Oregon*,⁴¹ the Court affirmed three defendants' state felony convictions following non-unanimous verdicts (as permitted under state law)—eleven-to-one verdicts in the cases of two of the defendants and a ten-to-two verdict in the other.⁴² Blackmun joined White's plurality opinion in *Apodaca* concluding that the Sixth Amendment does not require a unanimous twelve-person jury verdict because unanimity does not “materially contribute” to the “purpose of trial by jury . . . to prevent oppression by the Government” by “interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen.”⁴³ Ten jurors agreeing on an outcome, held the plurality, is enough commonsense to protect liberty.⁴⁴

Yet, despite *Apodaca*, Blackmun placed less importance than did White on the role of juries in curbing government overreaching. In *Codispoti*, White understood that the arbitrary exercise of government power, the thing the jury exists to prevent, might be the exercise of power by the trial judge—who is, of course, a government employee. Giving the case to the jury, White stated, reduces “the likelihood of arbitrary action” that exists when the judge, after the trial is

⁴⁰ *Id.* at 624-32. In other cases, Blackmun also pointed out that juries were prone to make mistakes. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 926-27 (1983) (Blackmun, J., dissenting) (discussing how jurors are easily misled by scientific evidence).

⁴¹ 406 U.S. 404 (1972).

⁴² *Id.* at 405-06, 414.

⁴³ *Id.* at 410.

⁴⁴ *Id.* at 411.

over, is able to file a series of contempt charges and that same judge, or another judge in the same building, determines guilt or innocence on those contempt charges and imposes a sentence that might run several years.”⁴⁵

Indeed, by dissenting from White’s opinion, Blackmun did not appear to recognize the general resemblance *Codispoti* bore to the most famous instance of juries protecting liberties: the prosecution of John Peter Zenger in New York in 1735 on charges of seditious libel for having published in his newspaper criticisms of corrupt New York Governor William Cosby.⁴⁶ In the Zenger trial, the court instructed the jury that the only thing for it to do was to decide, as a factual matter, whether the defendant published the newspapers in question and, if so, return a verdict of guilty.⁴⁷ Rejecting the argument of Andrew Hamilton, Zenger’s Philadelphia lawyer, that the jury should also decide whether the offending newspapers were libelous and whether the defense of truth applied, the court stated that it would determine—if the jury found Zenger published the materials—whether they were libelous, and, if they were, impose an appropriate sentence.⁴⁸ Zenger had admitted he published the newspapers and so a guilty verdict seemed inevitable in the case.⁴⁹ Yet the jury, present in the courtroom throughout the exchanges between the judge and Hamilton, returned an acquittal.⁵⁰ Despite its limited mandate, the Zenger jury protected the right to publish from an abusive government.

So too in *Codispoti* (and other cases involving charges of criminal contempt) the jury might serve to protect liberty. Though the jury would see the defendant’s misconduct on the record, and though the evidence of criminal contempt might be overwhelmingly clear, the jury might nonetheless acquit. It might conclude, for example, that the government—in the form of the angry trial judge—had gone too far in seeking contempt sanctions. It might decide that a finding of contempt would be unfair. It might oppose the government having a second chance to incarcerate a defendant. Viewed from the

⁴⁵ *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974).

⁴⁶ See generally A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER (1736), available at <http://www.courts.state.ny.us/history/zenger.htm>.

⁴⁷ *Id.* at 29.

⁴⁸ *Id.* at 18-19.

⁴⁹ *Id.* at 12.

⁵⁰ *Id.* at 30.

perspective of the Zenger case, Blackmun overlooked the important safeguard to liberty juries might offer in these circumstances.

A third common rationale for the jury system is that juries lend legitimacy to verdicts. Blackmun also did not seem to consider this to be the importance of the jury. For one, Blackmun plainly saw a significant role for the judge in keeping the jury in check. Blackmun wrote the majority opinion in *Smith v. United States*,⁵¹ holding that under the provision of federal law prohibiting the mailing of obscene materials,⁵² and in accordance with *Miller v. California*,⁵³ it is the job of the jury to apply the standards of its own community to determine whether material is obscene.⁵⁴ At the same time, Blackmun emphasized in *Smith*, judges had an important role in monitoring the jury's work. The trial judge should ensure that jurors are "instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority."⁵⁵ Blackmun further instructed that judges also should determine if the material falls within the substantive limits of *Miller*⁵⁶ and noted that an issue "particularly amenable to appellate review" in obscenity cases was the *Miller* prong that asks whether the material had redeeming literary, artistic, political, or scientific value.⁵⁷ More generally, Blackmun wrote, "it is always appropriate for the appellate court to review the sufficiency of the evidence."⁵⁸ Hence, juries bring the voice of the community to the courtroom—but the judge decides how strong that voice will be.

It comes, then, as no surprise that Blackmun was the author of the Court's *Daubert* opinion, holding that under the

⁵¹ 431 U.S. 291 (1977).

⁵² 18 U.S.C. § 1461 (2000).

⁵³ 413 U.S. 15 (1973). *Miller* held that material can be obscene only if:

(a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 25.

⁵⁴ *Smith*, 431 U.S. at 304-05.

⁵⁵ *Id.* at 305.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 305-06.

Federal Rules of Evidence, before expert scientific testimony is presented to a jury the trial judge must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue in the case.⁵⁹ While recognizing that this gatekeeping role of judges “inevitably on occasion will prevent the jury from learning of authentic insights and innovations,” Blackmun explained that evidentiary rules are “designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”⁶⁰

Blackmun’s skepticism towards the value that juries hold in lending legitimacy to verdicts can also be seen in his death penalty jurisprudence. Every death penalty case receives enormous public attention and presents an especially strong risk that its outcome will be perceived as illegitimate, particularly because the cost of error is so high. While Blackmun would ultimately conclude capital punishment was unconstitutional,⁶¹ in the earlier cases in which he voted to uphold a capital sentence, he did not think that a jury had to be entrusted with the task of deciding whether death was an appropriate penalty. In 1984, in *Spaziano v. Florida*,⁶² Justice Blackmun wrote the majority opinion holding that no constitutional violation occurs if, in accordance with state law, the trial judge in a first-degree murder case overrides the jury’s recommendation of life imprisonment and imposes a death sentence.⁶³ In *Spaziano*, the judge, as required under the Florida statute, independently found that there existed aggravating circumstances—the murder was heinous and atrocious and the defendant had committed a prior violent felony—that justified ignoring the jury’s decision and imposing a capital sentence.⁶⁴ Blackmun saw no problem with judges ignoring a jury’s decision in these circumstances. He explained that “a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to

⁵⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

⁶⁰ *Id.* at 597.

⁶¹ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

⁶² 468 U.S. 447 (1984).

⁶³ *Id.* at 449.

⁶⁴ *Id.* at 451-52.

be imposed on an individual,” and that this was an issue to which the Sixth Amendment jury right simply does not apply.⁶⁵ The Constitution, Blackmun reasoned, mandates only that a capital sentencing scheme be generally in accordance with the “twin objectives” of “measured, consistent application and fairness to the accused.”⁶⁶ A judge having the final word comports with those requirements: “Nothing in those twin objectives suggests that the sentence must or should be imposed by a jury.”⁶⁷

Blackmun was not persuaded by the petitioner’s arguments that the “[t]he imposition of the death penalty . . . is an expression of community outrage,” that jurors are “in the best position to decide whether a particular crime is so heinous that the community’s response must be death,” and that the decision of the jury should therefore be final,⁶⁸ points pressed by Justice Stevens.⁶⁹ Instead, Blackmun reasoned, the state legislature, in creating the particular death penalty scheme in the first place, had already given voice to the concerns of the community.⁷⁰ Legitimacy, in other words, derived from the statute itself. Though assuring readers that his opinion “do[es] not denigrate the significance of the jury’s role as a link between the community and the penal system and as a bulwark between the accused and the State,”⁷¹ Blackmun concluded that the Constitution permits judges, in accordance with the state’s own laws, to ignore the jury’s recommendation: “advice,” he wrote, “does not become a judgment simply because it comes from the jury.”⁷² Moreover, if the sentencing judge’s determination is irrational or arbitrary, there remains the possibility of correction on appeal.⁷³ Blackmun believed that even in capital cases, in which legitimacy seems most crucial, juries could be displaced.

⁶⁵ *Id.* at 459.

⁶⁶ *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982)).

⁶⁷ *Id.* at 460.

⁶⁸ *Spaziano*, 468 U.S. at 461.

⁶⁹ *Id.* at 481-90 (Stevens, J., concurring in part and dissenting in part).

⁷⁰ *Id.* at 462 (majority opinion).

⁷¹ *Id.* at 462.

⁷² *Id.* at 465.

⁷³ *Id.* at 466-67.

III. THE JURY AND DEMOCRACY

Though Justice Blackmun placed little emphasis on juries as accurate fact finders, guardians of liberty, and a source of legitimacy, he nonetheless valued juries—for a different reason. Blackmun considered juries an important component of democracy. In this view, juries matter because they represent an opportunity for citizens to participate in the workings of government. Like voting, jury service is a right and obligation of citizenship. Juries in this sense promote liberty, but not so much because any particular jury keeps the government in check or a jury watches out for the interests of a particular defendant. Rather, juries safeguard liberty because they are an aspect of a functioning democracy. The job of the Supreme Court, then, is to ensure juries are open for and conducive to participation—just as the Court safeguards the ability of citizens to vote.

Under this approach, juries must function as participatory bodies. A series of Supreme Court cases considered how the numerical composition of a jury affects its ability to function. In 1978, in *Ballew v. Georgia*,⁷⁴ Blackmun wrote for the Court in holding that a five-member jury in a criminal case violated the Sixth Amendment.⁷⁵ The jury's democratic purpose, Blackmun wrote, is only achieved by "the *participation* of the community in determinations of guilt and . . . the application of the common sense of laymen."⁷⁶ In 1970 (before Justice Blackmun's tenure) the Court had held in *Williams v. Florida* that a jury comprised of six citizens is constitutional.⁷⁷ Why then, were six jurors permissible in *Williams* while in *Ballew* five jurors were not? Citing a vast body of scholarly work on jury size prepared in the wake of *Williams*,⁷⁸ Blackmun concluded that a series of problems emerge if the number of jurors drops below six. Small-sized groups do not function well as deliberative bodies, Blackmun concluded.⁷⁹ Collectively, the members of very small groups have less reliable recall of evidence compared to larger groups; very small groups do not effectively solve problems; biases of

⁷⁴ 435 U.S. 223 (1978).

⁷⁵ *Id.* at 245.

⁷⁶ *Id.* at 229 (emphasis added).

⁷⁷ 399 U.S. 78 (1970).

⁷⁸ *Ballew*, 435 U.S. at 231 n.10.

⁷⁹ *Id.* at 232.

individuals are not tempered in small groups; minority viewpoints are also less likely to be asserted because individuals are reluctant to articulate views if nobody else in the group shares the view; and very small groups of decision-makers produce inaccurate results.⁸⁰ Moreover, Blackmun emphasized, as the size of the jury decreases, its benefit as a site of community participation naturally declines⁸¹ in that the “opportunity for meaningful and appropriate representation . . . decrease[s] with the size of the panel[].”⁸²

Consistent with his approach to jury size and deliberation in *Ballew*, in 1979, Blackmun joined Rehnquist’s opinion in *Burch v. Louisiana*, holding that a non-unanimous six-person jury was unconstitutional.⁸³ In 1980, in *Brown v. Louisiana*, Blackmun also joined Brennan’s opinion—which itself drew heavily on *Ballew*—in holding that the *Burch* rule applied retroactively.⁸⁴

Because juries are sites of democratic participation, Blackmun further saw his job as ensuring that jury participation is available to *all* citizens. As a judge on the Court of Appeals for the Eighth Circuit, Blackmun had already issued an important ruling on the unconstitutionality of excluding Black citizens from juries. In 1961, in *Bailey v. Henslee*,⁸⁵ Circuit Judge Blackmun held that the Equal Protection Clause required granting a habeas petitioner from Arkansas a new trial following his conviction by an all-White jury, and death sentence, when the method for selecting jurors involved jury commissioners who handpicked the jurors; the jurors’ race was notated in the records; Black jurors rarely served; and there was a recurrence in jury pools of the same few Black citizens who would likely be disqualified.⁸⁶ “When a right to a jury trial exists,” Circuit Judge Blackmun wrote, “a jury’s proper composition is fundamental.”⁸⁷

⁸⁰ *Id.* at 232-37.

⁸¹ *Id.* at 236-37.

⁸² *Id.* at 237.

⁸³ 441 U.S. 130, 134 (1979).

⁸⁴ 447 U.S. 323, 330 (1980). Note that in *Apodaca*, Justice White, in an opinion joined by Blackmun holding that the state can permit a verdict upon the vote of ten or eleven out of twelve jurors, explained also that the participatory aspect of juries is not undermined because the jury began as twelve citizens, selected from a representative pool. *Apodaca*, 406 U.S. at 412-14.

⁸⁵ 287 F.2d 936 (8th Cir. 1961).

⁸⁶ *Id.* at 947-48.

⁸⁷ *Id.* at 941 (footnote omitted).

At the Supreme Court, in *Taylor v. Louisiana*,⁸⁸ Blackmun joined White's opinion holding that a male criminal defendant's Sixth Amendment right is violated when, in accordance with state law, women were called for jury service only if they have previously filed a declaration indicating they want to serve—a system that resulted in a very small number of women in the jury pool.⁸⁹ If juries are to protect against arbitrary governmental power, White reasoned, the jury pool must reflect a fair cross-section of the population.⁹⁰ White noted also in *Taylor* that "[c]ommunity participation in the administration of the criminal law" is part of "our democratic heritage."⁹¹ A jury representative of the community, White stated, ensures "diffused impartiality," and that the "civic responsibility" of "administ[ering] . . . justice" is "shar[ed]."⁹²

Solidifying this approach, in 1977, Blackmun wrote the majority opinion in *Castaneda v. Partida*,⁹³ a habeas case, in which the Court found a Fourteenth Amendment equal protection violation when a defendant had been indicted by a Texas grand jury selected through an exclusionary process.⁹⁴ Under the key-man system in place in Texas, a state judge appointed three to five persons to serve as jury commissioners; they in turn selected fifteen to twenty individuals from the county to make up the list from which the grand jury was drawn.⁹⁵ Blackmun held that the petitioner had made out a prima facie case of intentional discrimination in the grand jury selection by showing that in a county in which 79.1% of the population was Mexican-American, only 39% of people summoned for grand jury service over an 11-year period were Mexican-American.⁹⁶ Blackmun also held that the state's claim that Mexican-Americans constituted a majority of elected officials in the county was insufficient evidence to rebut the prima facie showing.⁹⁷ Equal protection requires inclusiveness in choosing grand juries as well as petit juries.

⁸⁸ 419 U.S. 522 (1975).

⁸⁹ *Id.* at 525-26, 533.

⁹⁰ *Id.* at 530.

⁹¹ *Id.*

⁹² *Id.* at 530-31 (citation omitted).

⁹³ 430 U.S. 482 (1977).

⁹⁴ *Id.* at 501.

⁹⁵ *Id.* at 484.

⁹⁶ *Id.* at 486-91, 494-96.

⁹⁷ *Id.* at 499-501.

Two cases decided in 1979 further demonstrate Blackmun's commitment toward ensuring jury inclusiveness. In *Duren v. Missouri*, Blackmun joined White again to hold that a Missouri statute that granted women automatic exemption from jury service, thereby producing underrepresentation of women on jury venires, violated the defendant's Sixth Amendment rights.⁹⁸ That same year, Blackmun wrote for a majority in *Rose v. Mitchell*,⁹⁹ holding that racial discrimination in violation of the Equal Protection Clause in the selection of a grand jury is a basis for setting aside a criminal conviction, even when the verdict is reached by a properly constituted petit jury, and, further, that the issue can be raised in a federal habeas petition.¹⁰⁰ The case involved two Black defendants convicted in Tennessee of murder who claimed in their habeas petitions that the grand jury array, appointed through a key-man system in which three jury commissioners compiled a list of potential jurors, and the grand jury foreperson, appointed by the county court, had been selected in a racially discriminatory manner.¹⁰¹ After an evidentiary hearing, the federal district court dismissed the petitions on the ground that no showing of discrimination had been made.¹⁰² The Court of Appeals reversed on the issue of the selection of the jury foreperson, and vacated the convictions, and the Supreme Court granted review on that same issue.¹⁰³

In his opinion in *Rose*, Blackmun wrote that "[f]or nearly a century, this Court in an unbroken line of cases has held that 'a criminal conviction of a [Black defendant] cannot stand under the Equal Protection Clause if it is based on an indictment of a grand jury from which [Blacks] were excluded by reason of their race.'"¹⁰⁴ Shoring up this precedent, Blackmun located inclusiveness in grand juries at the heart of the Fourteenth Amendment's guarantee of equal protection: "Discrimination on account of race . . . [is] the primary evil at which the . . . Fourteenth Amendment . . . [is] aimed," and such discrimination is "especially pernicious in the administration of

⁹⁸ 439 U.S. 357, 366-68 (1979).

⁹⁹ 443 U.S. 545 (1979).

¹⁰⁰ *Id.* at 560-61, 564.

¹⁰¹ *Id.* at 547-48 & n.2.

¹⁰² *Id.* at 549-50.

¹⁰³ *Id.* at 550.

¹⁰⁴ *Id.* at 551 (citing, *inter alia*, *Neal v. Delaware*, 103 U.S. 370, 394 (1881)).

justice.”¹⁰⁵ Grand jury participation was, in Blackmun’s view, an element of democracy: “[t]he harm [of discrimination] is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole.”¹⁰⁶ Such discrimination, Blackmun reasoned, is “at war with our basic concepts of a democratic society and a representative government” and it causes injury to “the law as an institution . . . and to the democratic ideal reflected in the processes of our courts.”¹⁰⁷ To Blackmun, exclusion from a grand jury cut so deeply into the democratic fabric that it was a denial of equal protection in the plainest sense.

Precisely because the problem of exclusion lay at the core of equal protection and of democracy itself, Blackmun rejected the argument, one first advanced by Justice Jackson in a 1950 dissent¹⁰⁸ and urged in *Rose* by Justice Stewart, that so long as the trial itself was not defective, an improperly constituted grand jury could not be a basis for invalidating a conviction.¹⁰⁹ Blackmun also rejected the state’s argument in *Rose* that, following *Stone v. Powell*¹¹⁰—in which the Court, with Blackmun in the majority, had held that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner can not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at trial—because the trial itself was not defective, there should exist no habeas relief.¹¹¹ Blackmun wrote in *Rose* that “a claim of discrimination . . . differs . . . fundamentally” from a claimed violation of the Fourth Amendment because “[a]llegations of grand jury discrimination involve charges that state officials are violating the direct command of the Fourteenth Amendment.”¹¹² Hence, Blackmun stated, the claim is properly presented in a habeas petition.¹¹³ The individual defendants in

¹⁰⁵ *Rose*, 443 U.S. at 554-55.

¹⁰⁶ *Id.* at 556.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 552 (citing *Cassell v. Texas*, 339 U.S. 282, 298 (1950) (Jackson, J., dissenting)).

¹⁰⁹ *Id.* at 551-54.

¹¹⁰ 428 U.S. 465 (1976).

¹¹¹ 443 U.S. at 559-64.

¹¹² *Id.* at 560-61. “This contrasts with the situation in *Stone*, where the Court considered application of ‘a judicially created remedy rather than a personal constitutional right.’” *Id.* at 561-62 (quoting *Stone v. Powell*, 428 U.S. 465, 495 n.37 (1976)).

¹¹³ *Id.* at 564.

Rose were not, however, home free. Reviewing the evidentiary record generated below, Blackmun disagreed with the Court of Appeals that the grand jury selection was defective and he concluded that there was insufficient evidence to make out a prima facie case of discrimination.¹¹⁴ The habeas petition therefore had to be denied.¹¹⁵

In the ensuing years, Blackmun's view of juries as participatory institutions important to democracy strengthened. In 1986, in *Batson v. Kentucky*,¹¹⁶ Blackmun was in the majority holding that in a criminal trial the Equal Protection Clause prohibits the prosecutor from using peremptory challenges to remove panelists on the basis of their race,¹¹⁷ and that the defendant may establish a prima facie case of discrimination based on the prosecutor's use of peremptory challenges.¹¹⁸ Blackmun also dissented in two significant cases in which the majority refused to extend *Batson*. In 1990, Blackmun dissented in *Holland v. Illinois*,¹¹⁹ in which the majority held that while the use of peremptory challenges to exclude potential jurors on the basis of their race violates the Equal Protection Clause, it does not violate the Sixth Amendment's right to an impartial jury (the only argument the defendant in the case had raised at trial).¹²⁰ In 1991, Blackmun dissented in *Hernandez v. New York*,¹²¹ in which the majority found no *Batson* violation in excluding Latino jurors on the ground that they might not accept the translator's version of Spanish-language testimony.¹²² So too, in 1991, Blackmun joined Justice Kennedy's majority opinion in *Powers v. Ohio*, holding that the *Batson* equal protection principle applies whether or not the defendant and the excluded juror are of the same race, so that in the trial of a White criminal defendant the prosecutor is prohibited from excluding Black jurors on the basis of their race.¹²³ Blackmun also joined Kennedy's majority

¹¹⁴ *Id.* at 564-74.

¹¹⁵ *Id.* at 574.

¹¹⁶ 476 U.S. 79 (1986).

¹¹⁷ *Id.* at 89.

¹¹⁸ *Id.* at 93-95.

¹¹⁹ 493 U.S. 474 (1990).

¹²⁰ *Id.* at 486-88; *see id.* at 490 (Marshall, J. with Brennan, J. & Blackmun, J., dissenting).

¹²¹ 500 U.S. 352 (1991).

¹²² *Id.* at 375 (Blackmun, J., dissenting).

¹²³ 499 U.S. 400 (1991).

opinion in *Edmonson v. Leesville Concrete Co.*,¹²⁴ holding that equal protection also prohibits the use of peremptory challenges in a racially discriminatory manner in civil trials.¹²⁵ When civil parties in court exercise peremptory challenges, Kennedy held, they engage in state action: “If a government confers on a private body the power to choose the government’s employees or officials, the private body will be bound by the constitutional mandate of race neutrality.”¹²⁶ On this view, race-based exclusion violates the equal protection rights of the excluded juror and the opposing party in the case has standing to challenge the exclusion.¹²⁷

In 1992, in *Georgia v. McCollum*,¹²⁸ Blackmun, writing for a majority, extended the principle to the defendants in criminal trials, holding that they too are prohibited from exercising racially discriminatory peremptory challenges,¹²⁹ and that the prosecutor is entitled to assert the equal protection rights of the excluded juror to challenge a defendant’s decision.¹³⁰ Whether a potential juror is excluded by the state or by the defendant, Blackmun reasoned, “the harm is the same—in . . . [each] case[] the juror is subjected to open and public racial discrimination,”¹³¹ and the racially discriminatory selection procedure “undermine[s] . . . public confidence” in the judicial process.¹³² Blackmun held that a criminal defendant’s use of peremptory challenges is, like the prosecutor’s, state action.¹³³ He reasoned that state action exists because the peremptory challenge is a right established by state law;¹³⁴ the jury process in general is a function of the government, which summons prospective jurors, administers to them an oath, and pays them a stipend;¹³⁵ the jury in a criminal case performs a function—trial by jury—required by the Constitution;¹³⁶ and the public views the jury process as a

¹²⁴ 500 U.S. 614 (1991).

¹²⁵ *Id.* at 628.

¹²⁶ *Id.* at 625.

¹²⁷ *Id.* at 628-31.

¹²⁸ 505 U.S. 42 (1992).

¹²⁹ *Id.* at 50-55.

¹³⁰ *Id.* at 56.

¹³¹ *Id.* at 49.

¹³² *Id.*

¹³³ *Id.* at 51-56.

¹³⁴ *McCollum*, 505 U.S. at 51.

¹³⁵ *Id.* at 51-52.

¹³⁶ *Id.* at 52.

governmental process.¹³⁷ The fact that the defendant is on trial by the government does not undermine the conclusion that the defendant is the government when it comes to picking jurors.¹³⁸ Further, Blackmun found, applying the Equal Protection Clause to constrain the defendant's exercise of peremptory challenges does not interfere with the defendant's own right to a jury trial because all that the Sixth Amendment guarantees is the right to "trial by an impartial jury."¹³⁹

The holding seems astonishing: the criminal defendant, the individual experiencing the fullest power of the state and mustering every resource to prevent what the state seeks to do, is, according to Blackmun, an *agent* of the government itself. Justice O'Connor, in dissent, calls the result "perverse."¹⁴⁰ And yet if the jury is a site of democracy, the holding makes perfect sense. The jury does not exist for the benefit of the defendant but, rather, as an opportunity for citizen participation. Democracy therefore requires a response to efforts, including those by the defendant, to prevent citizens from participating fully.

Democracy does not only mean equal participation on juries regardless of race. In 1994, Blackmun also wrote the majority opinion in *J.E.B. v. Alabama ex rel. T.B.*,¹⁴¹ holding that equal protection rules likewise apply to prohibit the use of peremptory challenges on the basis of gender.¹⁴² "[W]hether the trial is criminal or civil," Blackmun wrote, "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."¹⁴³ Treating the exclusion of women from juries as inconsistent with their right to vote,¹⁴⁴ and at odds with "the value of women's contribution to civic life,"¹⁴⁵ Blackmun explained that women have suffered a similar plight as Blacks because, "with

¹³⁷ *Id.* at 53.

¹³⁸ *Id.* at 53-54 (noting that "[t]he exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense").

¹³⁹ *Id.* at 58.

¹⁴⁰ *McCullum*, 505 U.S. at 64 (O'Connor, J., dissenting).

¹⁴¹ 511 U.S. 127 (1994).

¹⁴² *Id.* at 128-29.

¹⁴³ *Id.* at 128.

¹⁴⁴ *Id.* at 131 (writing that "[m]any States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920").

¹⁴⁵ *Id.* at 134.

respect to jury service . . . [both groups] share a history of total exclusion.”¹⁴⁶ Using peremptory challenges to deny women an equal opportunity to serve on juries undermines their full participation in political life and renders them unequal citizens. Blackmun wrote:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. . . . It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.¹⁴⁷

Exclusion of citizens from juries represents a defect in the very operations of democracy.

IV. CONCLUSION: MODERN LESSONS

Blackmun’s understanding of juries as sites of political participation, though perhaps unusual in modern times,¹⁴⁸ turns out to be an old idea. Blackmun’s view would be familiar to eighteenth-century Americans. Alexander Hamilton in *The Federalist* identified the need to protect juries as an important component of American democracy and the single point of agreement among the diverse delegates to the Constitutional Convention: all of the convention delegates, Hamilton says, understood juries to be the “very palladium of free government.”¹⁴⁹ The anti-federalist author of the 1788 *Essays by a Farmer* identified juries as “the democratic branch of the judiciary power.”¹⁵⁰ Thomas Jefferson thought juries were more central to democracy than was the legislature, writing in 1789 that “[w]ere I called upon to decide whether the people

¹⁴⁶ *Id.* at 136.

¹⁴⁷ *J.E.B.*, 511 U.S. at 145-46 (footnote omitted).

¹⁴⁸ Though it resonates broadly with the view of Justice Breyer—who replaced Blackmun in 1994—of the need in constitutional interpretation to consider the value of “active liberty,” by recognizing that “the people themselves should participate in government.” STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5, 15 (2005).

¹⁴⁹ THE FEDERALIST NO. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁵⁰ *Essays by a Farmer* (pt. 4), MD. GAZETTE, Mar. 21, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981).

had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”¹⁵¹

Alexis de Tocqueville also understood the participatory benefits of juries when he observed in the 1830s that “[t]he jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.”¹⁵² According to Tocqueville, “juries . . . instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”¹⁵³ Indeed, consistent with this view of juries as sites of democracy, in the early years of the Republic, instead of simply deciding well-defined issues of fact, jurors also interpreted and applied the law.¹⁵⁴

What might it mean to take seriously today the idea that juries are important because they are sites of democratic participation? One implication is that the recent phenomenon, demonstrated by Marc Galanter and others, of the “vanishing” jury trial represents a significant erosion of democracy itself. In twenty-two state courts for which reliable data are available, between 1976 and 2002, the number of criminal cases decided by juries dropped from 42,000 cases out of 1.22 million cases, to fewer than 36,000 out of 2.78 million cases; in other words, a decline of juries in 3.4% of criminal cases in 1976 to 1.3% of criminal cases in 2002.¹⁵⁵ In federal court today, juries resolve fewer than 3,000 cases out of the more than 75,000 criminal cases filed, about 4%.¹⁵⁶ Civil juries are also disappearing. While the civil-case load of the federal courts increased five-fold between 1962 and 2004, the number

¹⁵¹ Letter from Thomas Jefferson to L’Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

¹⁵² ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (J.P. Mayer ed., George Lawrence trans., Perennial Library 1988) (1835).

¹⁵³ *Id.* at 274.

¹⁵⁴ See generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 100-01 (1998); Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903-21 (1994); John D. Gordan III, *Juries as Judges of the Law: The American Experience*, 108 LAW Q. REV. 272 (1992); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 446-54 (1996); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

¹⁵⁵ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 512 (2004).

¹⁵⁶ Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832 n.195 (2003).

of civil jury trials increased only modestly, from 2,765 to 3,006 trials over the same period.¹⁵⁷ In state courts, the absolute number of civil jury trials was one-third less in 2002 than it was in 1976.¹⁵⁸ Each of these developments means that fewer and fewer Americans today have opportunities to participate on juries.

Whatever the efficiencies of deciding cases without them going to jury trial, the decline of juries is a startling development. Eighteenth-century Americans would consider a criminal jury trial rate of 4% as bizarre as Americans today would view a proposal to select just four United States senators through elections and the remaining 96 by, say, a Senatorial Selection Committee appointed by the President. Or, put it this way: fewer than 40,000 juries deciding criminal matters today is equivalent—at a rate of twelve jurors per trial—to fewer than a half million citizens voting in national elections. If Blackmun is right about the participatory value of juries, it is democracy itself that is vanishing.

A second implication, suggested by Blackmun's opinion in *Ballew*, is the need for greater attention to the size of juries, and how size promotes or undermines participatory opportunities. *Ballew*, citing social science research on group dynamics, tell us that juries comprised of fewer than six jurors do not work well as deliberative bodies.¹⁵⁹ If six is the smallest size that does not lose participatory benefits, what is the largest sized jury that still works properly as a site of democracy? Are twelve jurors—an accident of history—the right number? Are there possibilities for increasing juries beyond twelve without undermining their benefits? The issue matters for purposes of securing and increasing opportunities for jury service today. When the number of juries called into action drops, making juries bigger may be one way to increase participation.

In this same vein, Blackmun's participatory theory of juries suggests that recent work by Robert Putnam and others tracking the disengagement of Americans, over the course of the past generation, from politics and other aspects of civic life

¹⁵⁷ Galanter, *supra* note 155, at 462-63.

¹⁵⁸ Brian J. Ostrom et al., *Examining Trial Trends in State Courts, 1976-2002*, 1 J. EMPIRICAL LEGAL STUDIES 755, 769 (2004).

¹⁵⁹ *Ballew v. Georgia*, 435 U.S. 223, 232-37 (1978).

may be incomplete.¹⁶⁰ Putnam presents a supply-side account of civic decline: Americans, increasingly consumed with private pursuits, have retreated from various forms of public participation.¹⁶¹ The evidence on juries suggests demand-side explanations may be more salient. On this account, Americans do not participate in an important democratic institution, the jury, because with judges, lawyers and other professionals taking over their work, the services of ordinary people in the judicial system are no longer needed.

Third, the democratic account of the jury suggests the need to think more broadly and creatively about the things juries might be entrusted to do—particularly in an age in which we do not ask them very frequently to decide cases at trial. Juries might continue to contribute to democracy by playing a role in sentencing proceedings, in mediation and settlement, in discovery and other pre-trial disputes, and in the examination and acceptance of guilty pleas.¹⁶² So, too, jury-like panels outside of traditional courts—for example, community courts, drug courts, youth courts—represent additional participatory opportunities for citizens.

Fourth, a participatory account of juries suggests, as Blackmun recognizes in *McKeiver*, *Ludwig*, and *McCollum*, that, in considering the uses, operations, and arrangements of juries, we, as a society, should focus less on how litigants want juries to look and function. Our present system allows litigants in civil and criminal cases to forego jury trial altogether. When juries are used, litigants, along with the judge, also exercise considerable control over them: deciding what they will hear, whether they can take notes, when they can come and go, what issues they will decide, and even when they can go to lunch or take a bathroom break. A participatory account of juries suggests the need to align juries less with the demands and wishes of litigants and focus instead on ensuring juries enhance democracy.

On that score, the jury as democracy suggests the need to end the practice of peremptory challenges—a point Justice

¹⁶⁰ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹⁶¹ *Id.* at 27.

¹⁶² See Mazzone, *supra* note 156, at 872-78 (proposing the use of juries to oversee the plea process).

Marshall had suggested in *Batson*,¹⁶³ and Justice O'Connor also raised in the *J.E.B.* case.¹⁶⁴ There are, after all, no peremptory challenges at the ballot box so it is reasonable to ask why, if jurors are like voters, we tolerate peremptory strikes in the jury box. Challenges for cause make sense: even some citizens are not permitted to vote (denying the vote to felons, for example, can be seen as a for-cause exclusion). However, when juries are meant to be open for all citizens to participate, litigants should not be permitted to decide that some citizens should not play a role.

Fifth, the participatory account of juries suggests also that the measure of successful jury performance should not be the accuracy of verdicts. Again, a comparison to voting is instructive. When elections are over, we may, and often do, wonder whether the voters have made wise choices. But nobody asks whether voters in an election have made “accurate” choices. So, too, we should be less obsessed with juror accuracy, and more appreciative of juries for their contributions to democracy.

Finally, the participatory theory of juries suggests, as Blackmun understood, an important role for judges to ensure juries properly fulfill their democratic function. In many ways, judges can and should monitor and structure the jury process—ensuring juries are open, making sure jurors understand their task, even reviewing their work. Just as judges have long played a role in correcting the undemocratic features of election, so too, judges can make sure democracy is served when citizens cast their votes in the jury room.

¹⁶³ *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”).

¹⁶⁴ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147-49 (1994).